

No. 11075

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WESTERN LOAN AND BUILDING COMPANY, a corporation,
Appellant,

vs.

ALBERT C. ARTHUR and H. B. ESTES,

Appellees.

APPELLANT'S OPENING BRIEF.

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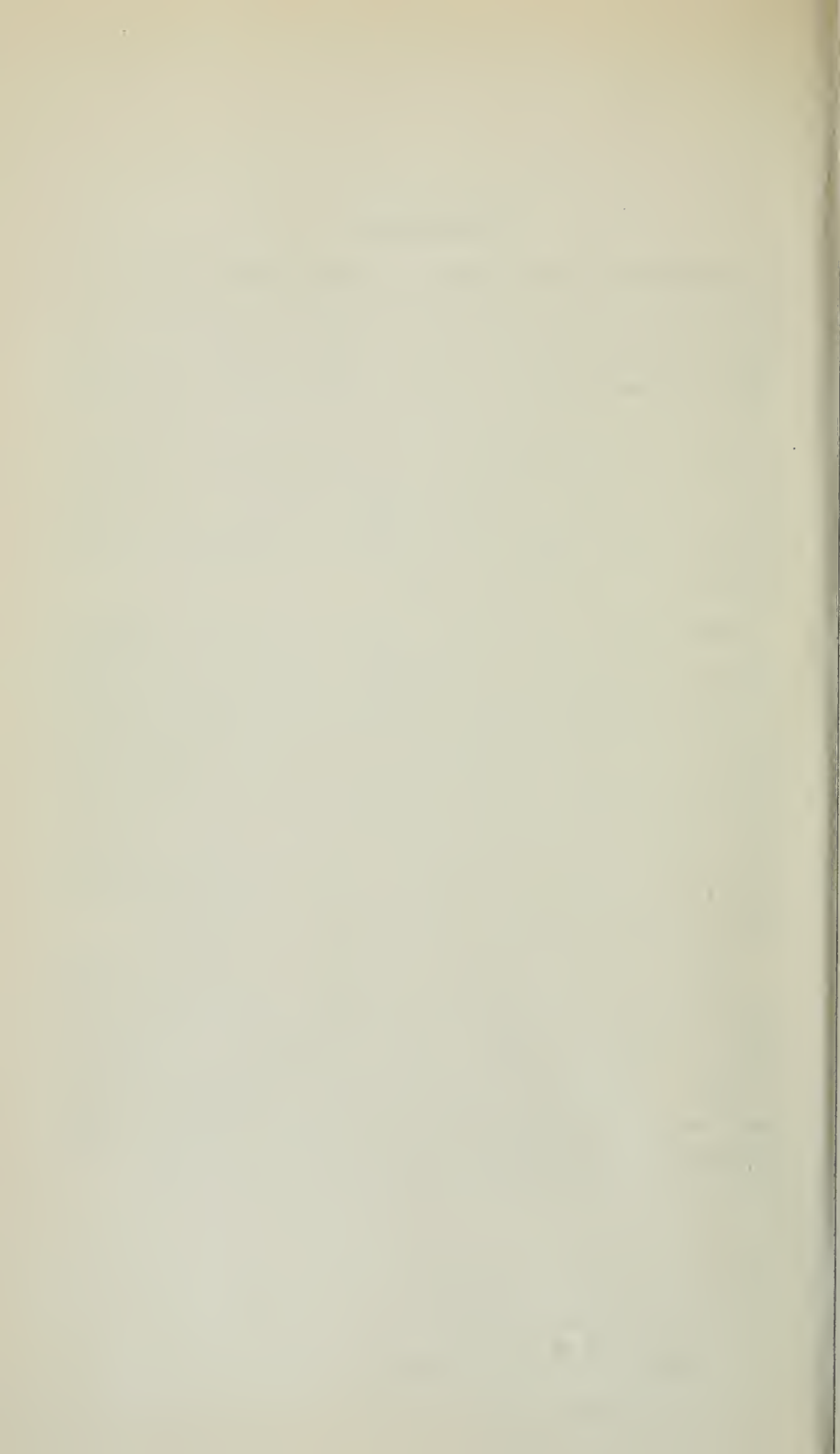
Jurisdiction.

Jurisdiction in this action is based upon diversity of citizenship and it is conferred by section 2 of article 3 of the Constitution of the United States and by section 28 of the Judicial Code as amended (28 U. S. C. A., sec. 71).

At all times the plaintiffs and appellees were residents of the State of California and the defendant and appellant was a corporation organized under the laws of the State of Utah and a citizen of that state [R. 6 at par. "4", R. 2 at par. "I", R. 25 at par. "a"].

This action was properly removed from the Superior Court of the State of California in and for the County of San Bernardino to the United States District Court in and for the Southern District of California, Central Division, in accordance with the requirements of section 29 of the Judicial Code as amended (28 U. S. C. A., sec. 72). The order of removal by the San Bernardino Superior Court [R. 14-15] was proper in view of the pleadings and bond previously filed by appellant [R. 3-10, 16].

Although the judgment was dated January 27, 1945 [R. 43] it was not signed and entered until February 19, 1945 [R. 42 and minute order of February 19, 1945, at R. 42]. The notice of appeal and the undertaking on appeal were filed May 18, 1945 [R. 44-45, 46] and consequently they were timely (28 U. S. C. A. sec. 230).



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APPELLANT'S OPENING BRIEF.

Statement of Facts.

This action is one by the appellees, as plaintiffs, to recover against the appellant, as the defendant, a deposit delivered by said plaintiffs to said defendant on an agreement to purchase an apartment house.

Appellant, Western Loan and Building Company, is a building and loan company under the jurisdiction of the California Building and Loan Commissioner. The home office of appellant is in Salt Lake City, Utah. The real estate sales department for the State of California is divided into two districts. The Southern California District was represented by James A. Carron through April 29, 1944 with offices at 308 West Olympic Boulevard, Los Angeles, California. The Northern California Dis-

trict was represented by Frank E. Sullivan with offices at 363 15th Street, Oakland, California. Mr. Sullivan was in general charge of all California sales.

The apartment house and furnishings involved in this action is situate in the City of San Bernardino where the two purchasers, Albert C. Arthur and H. B. Estes, lived and maintained their businesses. The Western Loan and Building Company did not maintain an office or representative in the City of San Bernardino.

Virtually all of the material facts are without any conflict. On three material issues, the facts are in conflict. Following is a concise statement of each group.

Facts Not in Conflict.

On April 1, 1944 in the lobby of the California Hotel in San Bernardino the appellees, Albert C. Arthur and H. B. Estes, signed a written offer to purchase from the appellant, Western Loan and Building Company, the Norman Manor and Norman Manor Annex, furnishings and equipment for \$86,750.00, \$21,000.00 of which was payable in cash and the balance of which was payable in installments secured by a deed of trust on the land and a chattel mortgage on furniture, furnishings and equipment. [Plaintiffs' Exhibits 1 and 6 and R. 69, 108, 205, 209, 219.] James Carron, the Los Angeles salesman, for the Western Loan and Building Company [R. 119] advised Messrs. Arthur and Estes that the offer to purchase had to be submitted to Salt Lake (the home office of the Western Loan and Building Company) for approval [R. 126-7, 110].

Mr. Estes, one of the offerors, had been a real estate broker for 15 years [R. 50-51]; with respect to the sale of the Norman Manor Apartments he was a co-purchaser

and also the broker; he was to receive a \$4,000.00 commission [Plaintiffs' Exhibit 6-backside, R. 73]. Mr. Estes had previously dealt with the Western Loan and Building Company in both of these capacities; in 1943 Mr. Estes was one of the purchasers from the Western Loan and Building Company of the Mission Riverside Apartments and some six months prior to that Mr. Estes had, as the real estate broker, negotiated for the Western Loan and Building Company the sale of its Melvin Sherwood Apartments [R. 100-101, 76]. As a result of these prior dealings and the one then pending Mr. Estes knew that the Western Loan and Building Company was a building and loan association under the supervision of the California Building and Loan Commissioner and that the regular procedure required that the property had to be appraised by certain appraisers approved by the Building and Loan Commissioner before the Salt Lake office could approve the sale [R. 86] and that the inventory of furniture, furnishings and equipment was taken so that these articles could be listed in the chattel mortgage given back as security for the unpaid balance by the purchasers [R. 215-16].

Three days after the offer to purchase was signed and on April 4, 1944 F. E. Sullivan, the California Sales Manager for Western Loan and Building Company [R. 153] wrote from Oakland, California, to James Carron in Los Angeles, California, and instructed Carron to have the apartments so appraised [Defendant's Exhibit B, R. 133-134]. The following day, April 5, 1944, Sullivan wrote from Oakland to C. J. Sumner, General Manager of the Western Loan and Building Company, at Salt Lake and advised Mr. Sumner of the offer to purchase (and its terms) and that an independent appraisal had been ordered [Defendant's Exhibit I-1, R. 267-269]. This letter

was received in Salt Lake by Western Loan and Building Company April 8, 1944 and the offer to purchase of Arthur and Estes referred in it (Sullivan's letter of April 5, 1944) was accepted by the Western Loan and Building Company through Mr. Sumner's letter of April 22, 1944 to Sullivan who was then at Los Angeles [R. 270]. This letter follows [Defendant's Exhibit I, R. 196-7]:

"WESTERN LOAN AND BUILDING COMPANY
Inter-Office Stationery
Home Office

To Mr. F. E. Sullivan, California Sales Manager
Los Angeles

From Mr. C. J. Sumner, General Manager

Date April 22, 1944

Subject RE 4427-4430

Norman Manor & Annex

Dear Mr. Sullivan:

Sale of the above properties as outlined in your letter of April 5th is approved.

Enclosed is analysis of operations.

Closing papers will be prepared as soon as you forward the necessary papers to prepare them.

Yours very truly,

C. J. Sumner

General Manager."

CJS:ek

[197]

Mr. Sumner's letter of April 22, 1944 was received in Los Angeles on April 24, 1944 [R. 203-4, 206-7] and thereafter that day Carron on behalf of Western Loan and Building Company, and in Mr. Sullivan's presence, telephoned from Los Angeles to the appellee, Arthur, in San Bernardino [R. 207, 203-4, Defendant's Exhibit F, R.

170-174 at 173], advising him the offer was accepted. It was then arranged to take the inventory.

Prior to April 22, 1944 when Mr. Sumner approved the sale [Defendant's Exhibit I] Salt Lake had in its possession an inventory [R. 239] and the independent appraisal of April 18, 1944 by Geo. L. Schmutz of the entire property covered by the offer of purchase—land, structures, furnishings [R. 238-240]. This appraisal placed a value on all this property of \$80,000.00 [Defendant's Exhibit \$86,750.00 contained in the offer) and of the \$80,000.00, \$6,000.00 was allocated to furnishings "as is" [R. 245].

On the 25th and 26th days of April, 1944 Carron went from Los Angeles to San Bernardino and took a complete inventory with Estes (all the time) and Arthur (part of the time) [R. 148, 211-13, 221]. The inventory necessitated a listing of every article [R. 149] of property in the 42 furnished apartments [R. 222]. It consisted of both sides of 6 large sheets (twice letter size) of paper [Defendant's Exhibit D] each of which were accepted and signed by Arthur and Estes on April 26, 1944 [R. 150, 218].

On the following day, April 27, 1944, Carron delivered the inventory to his office in Los Angeles [R. 152]. This was on Thursday. The data contained in the inventory was to be tabulated [R. 152] and a "recap" was to be made [R. 151]. On the following Saturday at noon, April 29, 1944 Carron left the employ of Western Loan and Building Company. On May 3, 1944 Sullivan sent the typed inventory (the recap) to Salt Lake with a request for the closing papers, which were to consist of the note, deed of trust, chattel mortgage, bill of sale,

deed and insurance policy [R. 156]. These closing papers were sent from Salt Lake on May 5, 1944 [R. 156], and they were received by Sullivan on May 8, 1944 [R. 156]. On said May 8, 1944 he advised plaintiffs that defendant was ready to close. On May 9, 1944 Sullivan personally delivered to the Security Title Insurance and Guaranty Company in San Bernardino escrow instructions in the form of a letter from Sullivan to the title company [R. 158-165, Defendant's Exhibit E] together with the various original instruments (all attached to Defendant's Exhibit E) listed in the instructions [R. 161, 165-166]. The deed and bill of sale conveying to Arthur and Estes the real and personal property which composed the Norman Manor and Norman Manor Annex Apartments and the furniture, furnishings and equipment were properly signed on May 5, 1944 on behalf of Western Loan and Building Company by C. J. Sumner as vice president (also the general manager) and the writer of the letter of acceptance dated April 22, 1944 [Defendant's Exhibit I) and R. B. Ritchie as secretary [R. 166-7]. Arthur and Estes were notified the documents were in escrow on May 10, 1944, but they refused to complete the escrow and the sale [R. 168].

On May 8, 1944 Arthur and Estes, through their attorney, Fred A. Wilson, prepared two letters identical in language which contained in part the following language:

"You are hereby notified that the undersigned, Albert C. Arthur and H. B. Estes, hereby withdraw and revoke their offer, dated April 1st, 1944 to purchase * * * the Norman Manor * * *"

Both letters [Plaintiffs' Exhibit 3, R. 55-56] were mailed to the Western Loan and Building Company from San Bernardino that day—one letter to the Salt Lake office and one to the Los Angeles office, each being received by the particular office at the time indicated by the notation on the letter [R. 103-106]; the letter to Salt Lake being received three days late [R. 105, Plaintiffs' Exhibit 3] and the letter to Los Angeles being received the following day, May 9, 1944 [R. 105, 158, Plaintiffs' Exhibit 3]. The contents of the two letters were also sent by night letter telegrams from San Bernardino to Western Loan and Building Company at Salt Lake and Los Angeles [R. 103-106, Plaintiffs' Exhibit 2, R. 52-54]; the night letter to Los Angeles arrived in Los Angeles at the telegraph office at 10:13 P. M. and was telephoned to the Los Angeles office of the Western Loan and Building Company on the following day, May 9, 1944 [R. 104, 158].

On May 9, 1944, the Salt Lake office of the Western Loan and Building Company sent a telegram to Arthur and Estes in San Bernardino [R. 178-180, Defendant's Exhibit G] in answer to the night letter of revocation [Plaintiffs' Exhibit 2] from appellees. This reads in part:

“Answer your wire your offer to purchase was
accepted and you were so notified prior to May
First * * *

On May 9, 1944 Sullivan wrote by registered mail from Los Angeles to Arthur and Estes in San Bernardino ad-

visting them that the escrow had been opened in San Bernardino and the papers deposited and also

“This will confirm the telephone conversation between J. A. Carron and Albert C. Arthur on April 24, 1944, in which Mr. Carron informed Mr. Arthur of the approval by the Western Loan and Building Company Home Office of the sale of the Norman Manor and Norman Manor Annex Apartments under the terms of your Offer to Purchase.” [R. 180, Defendant’s Exhibit H.]

Arthur and Estes each received duplicate originals of this letter on May 10, 1944 [R. 182].

The Western Loan and Building Company has been willing, ready and able at all times to complete the sale and transfers [R. 191].

Between April 1, 1944 (when the offer to purchase was signed by Arthur and Estes) and April 25, 1944 (when the inventory was commenced) Estes and Arthur each telephoned the Western Loan and Building Company in Los Angeles on several occasions at least to ask if Salt Lake had approved the offer to purchase [R. 213-218, 223-225, 227-228]. When Estes made his inquiries he made no mention of taking an inventory.

“Q. Now, you didn’t say to him at that time, ‘Let’s get busy and take the inventory,’ did you, ‘so that Salt Lake will approve this’? A. No. sir.” [R. 214, Mr. Estes being cross-examined by Mr. Mulliner.]

Issues in Conflict.

Mr. Carron testified that on April 24, 1944 he telephoned from Los Angeles to Mr. Arthur in San Bernardino and advised him that Salt Lake had accepted the offer to purchase [R. 146-8, 206]. At the same time he made arrangements with Arthur to take an inventory [R. 148]. This testimony by Carron was corroborated by Sullivan who instructed Carron on April 24, 1944 to so advise Arthur and Estes and who listened to Carron make the telephone call [R. 185, 187-9] and also by the telephone bill [Defendant's Exhibit F, R. 170-174 at 173]. Arthur, however, denied that Carron had advised him of Salt Lake's acceptance [R. 115-6, 225-7]. Both Estes and Arthur testified that Salt Lake could not approve the offer to purchase until an inventory had been taken [R. 210, 213, 220-2]. Both Carron and Sullivan testified unequivocally that Salt Lake did not require a taking of the inventory as a condition to acceptance or rejection of the offer to purchase [R. 235-6, 238].

Mr. Arthur did, however, admit that he received a telephone call from Mr. Carron before the inventory was taken [R. 225], and Mr. Estes admitted that Mr. Arthur told him that Arthur had a telephone conversation with Mr. Carron in which Mr. Carron stated that they had accepted the deal [R. 97-98]. He attempted later to qualify this by saying he thought the conversation with Mr. Carron was between the 5th and 10th of May. But the witnesses on both sides testified that they knew Mr. Carron was not with defendant, or had anything to do with this business, after April 29 [R. 152, 221].

Both Arthur and Sullivan testified that on May 8, 1944 (by Sullivan) or on May 9, 1944 (by Arthur) that Sullivan telephoned from Los Angeles to Arthur in San Bernardino and stated that Western Loan and Building Company had accepted and was ready to close. Arthur stated the conversation was on May 9, 1944 [R. 116]. Sullivan testified that on May 8, 1944 he received the closing papers from Salt Lake and that at about 1:30 P. M. of that day (May 8, 1944) he telephoned Arthur and told him he was ready to close the sale [R. 156-8] and that later in the day (May 8, 1944) at about 2:00 P. M. Sullivan telephoned Carron in San Diego [R. 176-7] and that still later that day (May 8, 1944) and at 5:30 P. M. he telephoned Estes [R. 183-4]. Carron corroborated the fact that Sullivan telephoned him in San Diego on May 8, 1944 at about 2:00 P. M. [R. 205-6]. The telephone bill of the Western Loan and Building Company also corroborates Sullivan's testimony [Defendant's Exhibit F, R. 170-4]—the pertinent part of which follows:

Apr

8	Carron	SD—RE	1.10
	5831	SBO—RE	.45
	Arthur	SBO—RE	1.10
	Estes	SBO—RE	.85

[at R. 173]. (Note—RE means the Real Estate Sales Department as distinguished from the Operating Department of the Western Loan and Building Company. These symbols were placed on the telephone bill to permit a proper distribution of costs for accounting purposes.)

POINT I.

A Verbal Acceptance Is Sufficient.

Appellant, Western Loan and Building Company, does not base its right to a favorable judgment upon the fact that it accepted in writing the offer to purchase. It contends that on two separate occasions (April 24, 1944 and May 8, 1944), that appellees, Arthur and Estes, were notified orally that their offer to purchase had been accepted. This notice was by and through the same source that their offer had been made, and from the same officers of the company to whom each of them had applied, repeatedly, for notice of the acceptance, and from whom they had expected to receive such notice. Appellant further contends that under the law this is sufficient to defeat a defaulting purchaser in an action to recover the deposit, or part payment, if the vendor is ready, willing and able to perform, as defendant was.

The trial court failed to grasp this and unquestionably based its decision upon the fact that Western Loan and Building Company had not signed anything. This is evident from the court's remarks and questions throughout the entire trial—as when the trial court asked Estes and Arthur if they had received a written acceptance or rejection to the offer to purchase [R. 92 and 115], and when the trial court asked Sullivan if he showed defendant's Exhibit I (the letter of April 22, 1944, from Salt Lake by Sumner and General Manager to Sullivan in Los Angeles approving the sale) to Arthur or Estes [R. 203],

and when at the conclusion of the evidence the trial court stated [R. 266]:

“The Court: I am inclined to think, counsel, that there was nothing communicated to the defendants of an authoritative acceptance of the offer until the receipt by them of the letter of May 9th, following the putting into escrow of these papers and documents executed by the officials of the Western Loan & Building Company. That, I think, was the first time [R. 213] that the plaintiffs received from the defendants an acceptance of their offer. That is this Exhibit H and that was testified, I think—you stipulated it was received May 10th. It bears the date of May 9th and it was testified it was put in the mail on May 9th. Following this, the deposit of these papers in escrow I think constituted an acceptance of their offer.” [R. 266.]

and when the trial court stated:

“The Court: But you didn’t tell them before the 1st except that if Mr. Carron’s communication is an acceptance.” [R. 254],

and when the trial court stated:

“The Court: If the offer had been accepted before the date of the inventory, it would have been a very easy thing [R. 201] to have communicated the formal acceptance and opened an escrow and demanded the inventory in the escrow if it was not the intention of the parties to say that this inventory was taken to be submitted to Salt Lake City before it was finally accepted.” [R. 256].

and when the trial court stated:

“The Court: If it had been accepted Mr. Carron or somebody would also have had authority to sign

this inventory with these parties here, if the deal had been accepted when this inventory was taken, but the fact that nobody signed this for the Western Loan and Building Company right while they were taking it and looking at it is an indication to me that it was not accepted." [R. 256-7.]

and when the trial court stated:

"The Court: Don't waste any more time about before May 1st. I am satisfied of that. None of these papers are dated before May 5th anyhow by the home office in Salt Lake.

Mr. Mulliner: You see by the agreement the closing date was to be May 15th.

The Court: I know that, but none of them were drawn until after May 1st. None of them were drawn until May 5th and they are dated that date." [R. 260],

and when the trial court stated:

"The Court: All right. I think, Mr. Wilson, that I would like to hear from the defendants in connection with the matter. I have read your briefs and memorandums submitted in connection with this. Will you touch in your argument on the proposition as to how under the law, assuming that Mr. Carron's testimony is true, that he 'phoned Mr. Estes or Mr. Arthur on April—whatever date it was—how that constitutes an acceptance when there was then no inventory, nothing upon which a bill of sale could be drawn, when there was never anything which was given to the plaintiffs in writing signed by any official or any person representing or purporting to represent the Western Loan & Building Company, whatever its name is?" [R. 248.]

Ever since Carron's oral notification to Arthur on April 24, 1944, Western Loan and Building Company has stood ready, willing and able to complete the sale; this is sufficient.

Perhaps the leading California case in a situation of this character is *Laffey v. Kaufman*, 134 Cal. 391 (66 Pac. 494). In the *Laffey* case there was nothing in writing—neither an offer nor an acceptance. Defendant had agreed orally to convey to plaintiff one-half acre for \$1500.00, \$500.00 of which was paid down. The balance was to be paid later. The purchaser (the plaintiff) refused to complete the contract and demanded back the down payment. The trial court had held that the contract being oral was void and rendered judgment for plaintiff for the return of the \$500.00 payment. The Supreme Court, however, reversed the trial court and rendered judgment for the defendant (the vendor). The Supreme Court's language (p. 393) follows:

"We think the court was in error in overruling the demurrer and in refusing to hear defendant's evidence. The action is not one to enforce the specific performance of a parol contract for the sale of lands, nor is it one in which a defense is based upon the statute of frauds.

The plaintiff, having made the contract, which is not unlawful nor against public policy, and having paid the money thereunder, cannot, of his own volition, and without fault of defendants, come into court and receive the assistance thereof to recover the money voluntarily paid. The money was paid for a valid consideration, to wit, the agreement to convey the land."

“The right of the vendee of land, under a verbal contract, to recover the money or other consideration paid is by all the authorities confined to those cases where the vendor has refused or become unable to carry out the contract, the plaintiff himself having faithfully performed or offered to perform on his part. (Browne on the Statute of Frauds, sec. 122; 2 Reed on the Statute of Frauds, sec. 738; Wood on Frauds, sec. 235; *Abbott v. Draper*, 4 Denio, 51; *Green v. Green*, 9 Cow. 46; *Coughlin v. Knowles*, 7 Met. 57; *Wetherbee v. Potter*, 99 Mass. 354, 361.)”

The *Laffey* case has been referred to with approval many times by the California courts. It is still the law of California. See *Walbridge v. Richards*, 212 Cal. 408, 413 (298 Pac. 985).

The Statute of Frauds (California Civil Code sections 1624, subdivision 4 and California Code of Civil Procedure section 1973, subdivision 4) presents no difficulty; nor does any theory of lack of mutuality—based upon the fact that the Western Loan and Building Company did not sign the written offer to purchase and therefore can't be bound. *Harper v. Goldschmidt*, 156 Cal. 245 (104 Pac. 451), is a complete answer to both of these points.

Harper v. Goldschmidt involved an action by the vendor to enforce the specific performance of a contract for the sale of land where the purchaser had not signed a contract of sale or memorandum. At the time the oral agreement was made the purchaser (defendant) paid \$250.00 on account and received in return from the vendor (plaintiff) a receipt reciting that the money was part payment and also reciting that the purchase price of the lot which was described was \$1400.00 payable in a fixed way. The court properly held that since the

purchaser had not signed the contract of sale specific performance could not be had. In making that decision the Supreme Court of California set out the true nature of the Statute of Frauds in the following language:

At page 248 of the official report:

“The English statute of frauds and perjuries of Charles II to which the similar statutes of all our states owe their origin, used the phrase ‘party to be charged’ in precisely the same manner and to the same effect as it is now used in our sections of the code. A glance at the English cases will establish that the ‘party to be charged’ did not mean the vendor, nor yet the vendee, but it meant the person charged in court with the performance of the obligation—the party defendant. (1 Sugden on Vendors, chap. 4, sec. 3, par. 2; Thornton v. Kempster, 5 Taunt. 786; Allen v. Bennett, 3 Taunt. 169; Seaton v. Slade, 7 Ves. Jr. 265.) It was not the vendor alone whom the statute of frauds and perjuries sought to protect, but the vendee equally.”

At page 249:

“Before the statute of frauds, an oral agreement could be proved against either party. The statute of frauds in no way interfered or attempted to interfere with the antecedent oral agreement, but, in effect, declared a rule of evidence that such agreement could not be proved unless the essentials of it had been reduced to writing and signed by the party to be charged.”

At page 251:

“In equitable theory the requirement of mutuality of remedy is satisfied when the non-signing plaintiff enters suit, since by the very bringing of his action he binds himself to abide by the decree of the court in

chancery and so empowers that court to decree specific performance against him. The commencement of his action is his offer to perform, and the precise situation is met and covered by the provisions of section 3388 of the Civil Code, which declares that. 'A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it. if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance.' (Bird v. Potter, 146 Cal. 286 (79 Pac. 970).)"

Although the appellant has not sought to compel specific performance it could have done so and the foregoing quotation from the *Goldschmidt* case show that the trial court's fears that the Statute of Frauds had been violated are groundless.

POINT II.

The Provision for Liquidated Damages in the Offer to Purchase Is Valid.

The principle established by the case of *Laffey v. Kaufman* (134 Cal. 391; 66 Pac. 494) cited at page 14 of this brief entitles Western Loan and Building Company to retain the \$4,337.50 deposit and part payment. The offer to purchase [Plaintiffs' Exhibit 6, R. 69-73], however, for the reasons set forth in the third paragraph [R. 70] provide that the Western Loan and Building Company may retain any deposit as liquidated damages under the conditions there specified. This may raise the question (improperly because of the *Laffey* case) as to whether or not the provision for liquidated damages is valid.

Although the trial court repeatedly and improperly rejected the evidence and the offers of proof made by

the Western Loan and Building Company on this question (see Point IX, page 50 of this brief) the liquidated damage provision is valid.

Section 1671 of the California Civil Code provides:

“Exception. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.”

The leading case in California construing similar provisions in cases like the one at bar is *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1 (55 Pac. 713).

In the *Glock* case the plaintiff agreed to buy some land for \$625.00. Plaintiff paid \$125.00 down and was to pay an additional \$125.00 annually thereafter in addition to interest and to reimbursing the defendant (the vendor) the cost of planting trees. Time was of the essence in the contract and after the time limits had passed the plaintiff tendered the balance of the purchase price to the defendant who rejected it. Plaintiff then demanded the return of the money previously paid by him—\$382.50 on account of the purchase price. The agreement provided that if plaintiff failed to perform, that any payments made were to be forfeited by plaintiff as liquidated damages. The Supreme Court rendered judgment for the vendor (the defendant) upholding for the first time in California the right of a vendor not in default to retain the money paid as liquidated damages in cases like the one at bar.

The reports are full of similar holdings. In *Petersen v. Bunting*, 43 Cal. App. 707 (hearing in the Supreme

Court denied) the court held that the vendor was entitled to retain as liquidated damages \$10,000.00 down payment made by plaintiff on a \$40,000.00 land purchase contract. In *Hawes v. Lux*, 111 Cal. App. 21 (hearing in Supreme Court denied) the court held that the vendor was entitled to retain a \$7,000.00 deposit paid by plaintiff on account of a \$68,100.00 purchase price of a home. In this case as well as in the *Petersen* case the defendant was ready, willing and able to perform. In the *Hawes* case in denying the purchaser (the plaintiff) the return of his money, the court states at page 24:

“The deposit receipt provided for the retention by appellants of the amount paid in the event of the failure of respondent to pay the balance, but even in the absence of such express provision it is well settled that the seller is entitled to retain the payments made prior to the unexcused default of the purchaser. (*Tuso v. Green*, 194 Cal. 574 (229 Pac. 327); *Glock v. Howard*, 123 Cal. 1 (69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713); 25 Cal. Jur. 797).”

In *Francis v. Shrader*, 38 Cal. App. 592 (hearing in the Supreme Court denied) the court permitted the vendor of some oil-bearing land to retain the \$15,000.00 as liquidated damages which had been paid by the purchaser (defendant) on account of the \$70,000.00 purchase price. In this action the vendor as plaintiff brought an action to quiet title to the property and the purchaser as defendant cross-complained. In rendering judgment for plaintiff and denying the purchaser the right to the return of his \$15,000.00 the court at page 597 sums up the position

of the purchaser, which is identical with that taken by plaintiffs in the case at bar and then rejects that position:

“The defendants (purchaser) stand upon the bald proposition that, the contract of sale not being completed or consummated, though through no fault of the plaintiff (vendor) and the latter having received a large sum of money on the purchase price, said money ought to be returned to them before they are required to give up possession of the property, notwithstanding that the Oil Company, vendee in possession, refused to go on with the fulfillment of the terms of the agreement.”

* * * * *

“Counsel for the plaintiff, in their brief, well and succinctly state the law in this state respecting the rights of the parties to contracts such as the one involved herein as follows: ‘It is now the settled law of this state that a vendee under a contract for the purchase of real property cannot continue to hold the possession thereof after making default in the payments as therein provided, regardless of whether the vendor has title or not; and that the vendee cannot refrain from making payments as by the contract provided, and also continue to hold possession of the land; nor can the vendee under any circumstances be entitled to the return of the money by him theretofore paid thereunder while he continues to hold possession of the land; nor can the vendee after making default in his payments without legal excuse ever recover the return of any of the money he may have paid thereon when the vendor was not in default of anything on his part to be kept and performed, except when there has been mutual rescission.’” (Citing *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 10 *et seq.* and other cases.)

POINT III.

The Offer to Purchase Was Definite and Certain.

The offer to purchase [Plaintiffs' Exhibit 6, R. 69-73] covers the sale of the Norman Manor and Norman Manor Annex Apartments and the "furniture, furnishings and equipment." [R. 71.] The land is described in the customary manner by lot, block and tract, and the "furniture, furnishings and equipment" in that exact language.

The trial court clearly indicated that this was an inadequate description and its language follows:

"The Court: I really don't think, counsel, under the evidence, and I have followed it very carefully, that there was any acceptance of this offer before May 1st. In the whole nature of the transaction, I don't see how you are going to give a bill of sale and a chattel mortgage until you have an inventory and know what is going to be in the bill of sale."
[R. 255-6.]

Two misconceptions are immediately apparent from this remark. In the first place the terms of the offer to purchase do not provide that the acceptance of the Western Loan and Building Company must be made simultaneously with the delivery of the bill of sale and the chattel mortgage. On the contrary the offer to purchase refers to "close of escrow." [R. 72.]

The escrow supplied the mechanics by which the accepted offer was to be carried out and was for the purpose of protecting both parties to the transaction pending title search, preparation of the deed, bill of sale, chattel mortgage, etc. We know of no theory of law which conditions an acceptance upon the subsequent and mechanical act of executing the appropriate documents.

In the second place the description "furniture, furnishings and equipment" is adequate, definite and certain. If the Western Loan and Building Company executed or were to execute a bill of sale in the following language

"In consideration of the sum of \$10.00 the receipt of which is hereby acknowledged, the Western Loan and Building Company hereby sells and transfers to Albert C. Arthur and H. B. Estes all the FURNITURE, FURNISHINGS AND EQUIPMENT presently situate . . . ,"

it would have been sufficient. No law requires the seller to itemize in the bill of sale every screw driver, rag, chair, inkwell, pillow case, etc. that is part of an operating apartment house.

In *Ross v. Frank*, 13 Cal. App. 88 at page 89 the court upheld a contract providing for the sale of

" . . . all of the French prunes now on the trees or being picked and dried from the Ross Orchard on the Soap Lake Road at Prunedale, estimated at about 35 tons more or less when dried,"

In *Houghton Co. v. Kennedy*, 10 Cal. App. 426 (102 Pac. 533 hearing in Sup. Ct. denied) the court ruled against the seller where he sought to remove a barn from land sold involving a written instrument executed by seller containing the following language at page 427:

" . . . assigned and transferred and delivered unto the Houghton Company, a corporation, all of their right, title, estate, claim or interest in or to all of the following described personal property and appurtenances to real estate, to wit: all of the fences and buildings of every description, and all engines, pumps,

appurtenances and pipelines, scales, watering troughs and other property and appurtenances of like character and description, all situated upon or connected with the lands and property described in a certain lease between J. F. Houghton and J. W. Kennedy, dated October 1st, 1901, and the lands and property described in a certain trust deed from said J. W. Kennedy and wife to H. B. Houghton and H. F. Gordon, trustees for J. F. Houghton, dated the 15th day of December, 1898, and recorded in volume 220 of Deeds, page 430 *et seq.*, Fresno County Records; together with and including all of the connections and appurtenances used in connection with said property situated upon said lands, or in the vicinity thereof, including any such property situated upon or extending through or under the townsite of Rolinda, or through or under the streets, roads or highways thereon, or in the vicinity thereof.”

The specific words of the court being (at page 428):

“It is the concluding language of the assignment that covers the barn, to wit: ‘Including any such property situated upon or extending through or under the townsite of Rolinda, or through or under the streets, roads or highways thereon, or in the vicinity thereof.’ The words ‘any such property’ refer to such property as had before been enumerated, which includes ‘buildings of every description,’ and the entire clause brings within the operating words of the assignment buildings of every description situated upon the townsite of Rolinda or in the vicinity thereof. We are unable to fairly read the words of the assignment in any other sense.”

In *Northwestern Paper Co. v. Concord Paper Co.*, 214 App. Div. 537 (212 N. Y. S. 318) (affirmed in 242 N. Y.

562) the court held that there was a sufficient description in a contract of sale which read:

“ . . . all of the paper in rolls now stored at warehouse”

In *McIllmoil v. Frawley Motor Co.*, 190 Cal. 546, the court upheld a contract which provided:

“I will buy a new Mitchell car.”,

although no reference was made to model or price. In so ruling the court stated at page 549:

“The law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained. (*Sutless v. Seidenberg, S. & Co.*, 132 Cal. 63 (64 Pac. 131, 469). The description of the subject matter of agreement may be indefinite, and yet if it is capable of being identified and rendered definite and certain by evidence *aliunde* the contract is enforceable. (*Mebius & Drescher Co. v. Mills*, 150 Cal. 229 (88 Pac. 917); *Elliott on Contracts*, sec. 179).”,

and at page 552:

“It thus appears that the contract herein is identical in all essential respects with that which was held valid and binding, in *Mebius & Drescher Co. v. Mills*, 150 Cal. 229 (88 Pac. 917). As was there said, by way of illustration: ‘Reduced to simpler terms, if a man should say to a seller, “I will take from you three dozen pocket-knives of one or all of three described kinds,” the price for each kind being specified, “but I want you to agree to give me a week in which to determine which of the kinds I will select,” it would come with some astonishment to a merchant to

be told that such an agreement was void in law for uncertainty. It is probably safe to say that a million of such transactions take place every month throughout the country, without question or the possibility of question as to the legality of the agreement.' ”

The total sales price involved in the offer to purchase is \$86,750.00. The furniture, furnishings and equipment had a value of \$6,000.00 [Defendant's Exhibit K, R. 241-247 at 245 under the heading “Furnishings as is”] thus leaving a value of \$80,750.00 for the real property. The real property was described by lot, block and tract and it was, therefore beyond any question, described with definiteness. Assuming an uncertainty (but not granting) existed as to the furniture, furnishings and equipment the law is well established that the contract will not be held void for uncertainty of description under these circumstances.

POINT IV.

The Terms of the Offer to Purchase Provided That It Was to Remain Open Until May 15, 1944.

The offer to purchase [Plaintiff's Exhibit 6, R. 69-73] contains the following two provisions:

“The Offerer (Arthur and Estes) hereby agrees that this offer shall remain open and irrevocable to and including May 1st, 1944, unless sooner rejected or accepted * * * ” [R. 70].

“* * * closing date May 15, 1944.” [R. 72.]

Every provision in a contract or instrument must be given a meaning if possible. This rule is so well established we shall not burden the court with citations. Giv-

ing both provisions meanings which are harmonious we must find that the offer by its terms:

- (a) was irrevocable until May 1, 1944, and
- (b) that from May 1, 1944 to May 15, 1944 it was revocable until accepted.

The offerors, Arthur and Estes, placed this very construction on the offer and they cannot change that position now.

Estes testified:

“I went into his office (the office of Mr. Wilson, attorney for Arthur and Estes) to notify Salt Lake that WE WERE WITHDRAWING our offer.” (Our small caps.) [R. 102.]

This visit by Estes occurred on May 8, 1944 or 8 days after the offer ceased to be irrevocable. [Mr. Wilson’s stipulation that he was interviewed by Mr. Estes on May 8, 1944 and instructed to draft letters revoking the offer. [R. 103-104.]

When Mr. Estes stated that on May 8, 1944 “*We were withdrawing our offers*”, he stated in very concise language that which he or another might have said in the following words:

“Our offer doesn’t expire until May 15, 1944. We can revoke it, however, now that May 1, 1944 has passed. Therefore I shall instruct our attorney, Mr. Wilson, to prepare the necessary paper to revoke our offer.”

Following this visit on May 8, 1944 by Mr. Estes to Mr. Wilson's office, the latter, as attorney, prepared two letters [Plaintiffs' Exhibit 3, R. 55-56] revoking the offer. These letters contained identical language and both were signed by Arthur and Estes, one was sent to the Western Loan and Building Company at Los Angeles and the other to Salt Lake.

These letters contain the following language:

"You are hereby notified that the undersigned Albert C. Arthur and H. B. Estes, *hereby withdraw and revoke their offer * * **" (italics ours) [R. 55 and 56].

"Hereby withdraw and revoke" means revoke now, to cancel that which was existing and alive at the time. If Arthur and Estes did not believe that their offer was open after May 1, 1944 and until May 15, 1944 their letter would have been something like the following:

"Our offer to you dated April 1, 1944 to purchase * * * expired May 1, 1944. You failed to accept the offer prior to May 1, 1944. Accordingly we are entitled to the return of our deposit in the amount of \$4,337.50 which we shall expect by return mail.

. Yours truly,"

The two telegrams of revocation [Plaintiffs' Exhibit 2, R. 53-54] contained the identical language as the letters and like the letters one was sent to appellant at Los Angeles and the other to Salt Lake. These telegrams simply emphasize the fact that the offer was open as late as May 8, 1944.

POINT V.

Regardless of Any Time Limit Which May Have Been Fixed by the Terms of the Offer to Purchase the Offerors, by Their Conduct Waived That Time Limit Until Salt Lake Had Accepted.

Even though we accept at face value the testimony of Arthur that Carron did not advise him in their telephone conversation of April 24, 1944, that Salt Lake had accepted the offer to purchase and that during the taking of the inventory that Carron told Arthur that Salt Lake had not yet accepted and the testimony of both Estes and Arthur that they were each told by Carron or Sullivan that an inventory must be taken before Salt Lake was in a position to accept or reject the offer (all of which is the exact opposite of the true facts), still the trial court erred in not finding that Salt Lake had accepted while the offer was open.

The offer to purchase [Plaintiffs' Exhibit 6, R. 69-73] provides in part that:

"The undersigned offerer (Arthur and Estes) understands and agrees that upon receipt of this offer and pending approval and closing that other sales may be lost to the owner, Western Loan and Building Company; that the Owner will at once commence investigation hereon, cause appraisals to be made and an examination by its Executive Committee to be had, that some time and substantial expense will be required, and that the exact loss and expense to owner cannot be determined. * * * The offerer hereby agrees that this offer shall remain open and irrevocable to and including May 1st, 1944, unless sooner rejected * * *'" [R. 70].

The offer to purchase was more than a mere offer which is to be accepted or rejected by Western Loan and Building Company. Along with the offer is the collateral agreement by which the offerers agree that the offer shall remain irrevocable until May 1, 1944 in return for which Western Loan and Building Company was to undertake certain obligations. These were that Western Loan and Building Company

- (a) "at once commence an investigation * * * and"
- (b) "cause appraisals to be made and"
- (c) "an examination by its Executive Committee to be had"

The acceptance by Western Loan and Building Company of the \$4,337.50 constituted an implied promise by Western Loan and Building Company that it would undertake to perform each of these acts, and Western Loan and Building Company did each of these things; an independent appraisal of the property was made on April 18, 1944 by George L. Schmutz, Realtor Appraiser, at 4725 Ledge Avenue, North Hollywood [R. 238-40, Defendant's Exhibit K, R. 241-247], an investigation was made by H. B. Scudder, a director of the Western Loan and Building Company [R. 193 and Defendant's Exhibit J for identification improperly rejected in evidence] and the Executive Committee undoubtedly made its examination for Sullivan testified without contradiction that Sumner, the General Manager, advised him to close the sale [R. 201, Defendant's Exhibit I, R. 197], that Sumner was a member of the Executive Committee [R. 195] and that this procedure had been followed in 500 sales in California [R. 202]; and it must be implied also from the execution and receipt by Sullivan of the deed, bill of sale,

chattel mortgage, etc., on May 8, 1944 [R. 156] all of which were duly executed by the Vice President and Secretary of Western Loan and Building Company [R. 165-167, Defendant's Exhibit E].

The doing of each of these acts by Western Loan and Building Company constituted sufficient consideration moving from the Western Loan and Building Company to Arthur and Estes or a sufficient detriment to Western Loan and Building Company to support this collateral agreement to make the offer irrevocable until May 1, 1944.

Even without this consideration or detriment the offer would have been irrevocable.

"An attempt is sometimes made to prevent the revocation of an offer by requiring the offeror to deposit money or a check at the time of making the offer. It is evident that this cannot make the offer irrevocable since the offeror receives no consideration and the offeree parts with nothing. But if the offeror withdraws his offer, and the understanding of the parties has been made clear that the deposit is to be forfeited if the offer is revoked, the agreed consequence would follow the revocation." (Williston on Contracts, Rv'd Ed., Vol. 1, at 181.)

Once Western Loan and Building Company commenced performing its part of this collateral by having appraisals, etc., Arthur and Estes were compelled to await acceptance or rejection until May 1, 1944 under the language of the offer. Under the circumstances here they waived that deadline and authorized Western Loan and Building Company to accept the offer to purchase within a reasonable time after May 1, 1944. Western Loan and Building Company accepted within this reasonable time.

This is good law and again we cite Williston on Contracts, Rv'd. Ed. Vol. 1, section 53, page 151:

“* * * Not infrequently an offeror who has imposed a limit of time in his offer does not care to insist upon it and by further negotiations may indicate a continued willingness to stand by the terms of his offer. Any such manifest action of continued willingness is in effect a new offer, which may be accepted and if accepted will ripen into a contract.”

and, also a very recent case by the Supreme Court of Idaho.

“So far as appellants are concerned, the record presents two questions, which will be disposed of in the following Order:

1. Did Ralph fail to exercise the option within the terms of the option agreement?
2. Was the allowance by the Court for the use of the premises by White for mining purposes excessive?

The record supports conclusion that Ralph exercised the option within the time fixed therein and extension thereof by mutual agreement of the parties.

By reason of White's acts and conduct he is not in position to successfully contend that the option was not extended beyond the time fixed in the option. The rule is established that the time fixed in an option may be extended by the acts and conduct of the parties thereto.

“However, notwithstanding time is generally of the essence of an option, the parties may waive the requirement of performance within the time stipulated either expressly or by their conduct.” 66 C. J., p. 504, sec. 28. (*White v. Ralph*, 154 Pac. Rp., 2nd Series 167, at page 169, Idaho Supreme Court, December, 1944, Idaho)

The following facts bring our case within the above principle.

Before the inventory was taken on the 25th and 26th of April, 1944 Arthur asked Carron several times if Salt Lake had accepted [R. 223-4] as did Estes of Carron or Sullivan [R. 214-217]. Then Arthur testified that Carron arranged with him by telephone to take the inventory [R. 225 and 227]; this was the conversation Carron identified as occurring on April 24, 1944 [R. 146-7, Defendant's Exhibit F, R. 170-174 at 173].

On the 25th and 26th of April, 1944 Carron and Estes took the inventory of all furniture, furnishings and equipment [R. 148-149]. There were 42 furnished apartments [R. 222]; all apartments were occupied [R. 237], the inventorying required working during the evening of the 25th [R. 148]; both Arthur and Estes testified the taking of the inventory was required before Salt Lake could accept [R. 210, 213, 221-2], Estes testified that Salt Lake had to approve the inventory [R. 213], Estes testified that after the inventory was taken "Salt Lake would have to send their escrow instructions from Salt Lake to the Title Company" [R. 218]. Estes testified that after the inventory was taken that

" . . . we (Arthur and Estes) wanted to rush it (the sale) through as fast as possible", [R. 218].

Arthur testified that when Estes and Carron brought him the inventory for signing that Carron said that they would have to wait for information from Salt Lake and that Sullivan would advise them (Estes and Arthur) of

Salt Lake's action since he (Carron) "was leaving the company" [R. 221].

There is not one single bit of testimony from Arthur or Estes or from any other witness to the effect or implication that Salt Lake had to get the closing papers back to California prior to May 1, 1944. It was understood this could not be done.

The inventory [Defendant's Exhibit C] filled both sides of six large sheets of paper (twice letter size) listing one by one and apartment by apartment every piece of linen, furniture, cooking utensils, china, etc. It was completed Wednesday, April 26, 1944. On the following day, Thursday, April 27, 1944, Carron delivered the inventory to his office in Los Angeles [R. 152] to be tabulated and to make a recap [R. 151]. This was to correlate the data so that the bill of sale and chattel mortgage could be prepared, as Estes testified he knew [R. 215-216]. On the following Saturday at noon, April 29, 1944 Carron left the employ of Western Loan and Building Company. On May 3, 1944 Sullivan sent the typed inventory (the recap) to Salt Lake with a request for the closing papers, which were to consist of the note, deed of trust, chattel mortgage, bill of sale, deed and insurance policy [R. 156]. These closing papers were sent from Salt Lake on May 5, 1944 [R. 156] and they were received by Sullivan on May 8, 1944 [R. 156]. On May 9, 1944 Sullivan personally delivered to the Security Title Insurance and Guaranty Company in San Bernardino escrow instructions in the form

of a letter from Sullivan to the title company [R. 158-165, Defendant's Exhibit E] together with the various original instruments [all attached to Defendant's Exhibit E] listed in the instructions [R. 161]. The deed and bill of sale conveying to Arthur and Estes the real and personal property which composed the Norman Manor and Norman Manor Annex Apartments and the furniture, furnishings and equipment were properly signed on May 5, 1944 on behalf of Western Loan and Building Company by C. J. Sumner as vice president (also the general manager) and the writer of the letter of acceptance dated April 22, 1944 [Defendant's Exhibit I] and R. B. Ritchie as secretary [R. 166-7]. Arthur and Estes were notified the documents were in escrow on May 10, 1944, but they refused to complete the escrow and the sale [R. 168].

There wasn't one thing that the Western Loan and Building Company could have done faster. Everything Western Loan and Building Company did was done as fast as was humanly possible, and it was done when Arthur and Estes expected it to be done—and within a reasonable time after they indicated that the time limit on the irrevocable offer would be extended to permit Western Loan and Building Company to act upon the inventory. No legal basis nor any moral concept can be invoked by Arthur and Estes which will enable them to justify the attempted revocation of their offer.

POINT VI.

The Inventory Had No Connection With Salt Lake's Acceptance and it Was for the Sole Purpose of Permitting the Western Loan and Building Company to Take an Enforceable Chattle Mortgage Back as Partial Security on the Unpaid Balance of the Purchase Price (\$65,750.00).

Under Point III (beginning at page 21 of this brief) we have shown beyond question that the description "furniture, furnishings and equipment" was sufficiently definite and certain.

The Western Loan and Building Company had an independent state appraisal of the property prior to April 21, 1944 [R. 239—the appraisal of Schmutz dated April 18, 1944, Defendant's Exhibit K, R. 241-7] which covered all land, structures and other physical inventory. This inventory placed a value of \$80,000.00 on the property [R. 242] or \$6,750.00 less than the sales price contained in the offer to purchase. If the sale had been 100% cash the inventory taking of the 25th and 26th of April, 1944 would have been senseless and purposeless.

The sale was largely on credit and Western Loan and Building Company needed an accurate inventory in order to prepare a bill of sale and a chattel mortgage back. Estes admitted this [R. 215-216].

At one time we thought the trial court understood this when it remarked:

"The Court: * * * Everybody knows that is the purpose in taking an inventory. You have got to have an inventory to have a chattel mortgage" [R. 216].

Subsequently, however, the trial court changed its position when it remarked:

“The Court: I really don’t think, counsel, under the evidence, and I have followed it very carefully, that there was any acceptance of this offer before May 1st. In the whole nature of the transaction, I don’t see how you are going to give a bill of sale and a chattel mortgage until you have an inventory and know what is going to be in the bill of sale” [R. 255-256].

The testimony of both Arthur and Estes also shows that neither believed the inventory was a condition precedent to Salt Lake’s acceptance. Arthur testified in his deposition (although to the exact contrary on cross-examination) that between April 1, 1944, when the offer was signed, and April 25, 1944, when inventory taking started, that he asked Carron on several occasions if Salt Lake had accepted [R. 223-225]; Arthur also asked Carron if Salt Lake had accepted when Carron telephoned him to arrange for taking the inventory [R. 225-227] and again when Carron, Estes and Arthur lunched at the “Carnation Place” [R. 227] which Estes fixed as occurring on April 25, 1944 “the morning we took the inventory” [R. 212]. Arthur also testified:

“I would keep on asking (about Salt Lake’s acceptance) him (Carron) every time I saw him.” [R. 227],

because he (Arthur) thought it (the sale) might have gone through [R. 228].

Estes had a little difficulty with respect to these same questions and he testified first on direct examination that he did not recall asking Carron or Sullivan prior to the

inventory taking if Salt Lake had accepted [R. 211], then on cross-examination he stated that about ten days after April 1, 1944 that he asked Carron or Sullivan if Salt Lake had accepted [R. 214] and again about a week later [R. 214] making two times prior to April 25, 1944; then Estes changed the times of asking and fixed them as occurring after the inventory had been taken [R. 214]; then Estes was confronted with his deposition and he admitted he called Carron or Sullivan several times prior to April 25, 1944 to see if Salt Lake had accepted [R. 216-217]. And with reference to this same line of cross-examining Estes testified:

“Q. Now, you didn’t say to him at that time, ‘Let’s get busy and take the inventory,’ did you, ‘so that Salt Lake will approve this’? A. No, sir” [R. 214].

There is one conclusion only that can be drawn from the foregoing testimony of Arthur and Estes and that is that both knew that Salt Lake could accept the offer to purchase prior to the taking of the inventory, and their testimony that both Carron and Sullivan had advised them to the contrary is just not true, for in no way can their two sets of testimony and acts be reconciled.

Carron specifically denied that he had ever told Arthur or Estes that the inventory had to be taken and sent to Salt Lake before it could accept [R. 235-236] as did Sullivan [R. 238]. Their testimony (Carron and Sullivan) is the only testimony that is logical, probable and fits the facts and the trial court was compelled to accept it.

Carron was leaving the employ of Western Loan and Building Company as of May 1, 1944 and his last day of labor was April 29, 1944. If the taking of the in-

ventory was essential to Salt Lake's acceptance wouldn't it have been taken immediately after the offer to purchase was signed on April 1, 1944? Why did plaintiffs expect the offer to be accepted before the inventory was taken?

The Western Loan and Building Company had many apartment houses for sale; there had been 500 sales of various kinds in California [R. 202]. Inventory taking in furnished apartments is a tedious and drawn-out job. No concern could afford to take the time, disturb the tenants and worry apartment house managers and help about possible loss of jobs every time an offer to purchase came during a period of an active real estate market. This was a major operation and would be undertaken, as Carron and Sullivan both testified, only after a firm agreement for sale had been reached.

The blanket story advanced by Arthur [R. 231-233] was simply an attempt to bolster his prior testimony concerning the purpose of the inventory. The story was flatly denied by the two men (Carron and Sullivan) who were in a position to know [R. 237, 238] and it simply further discredits the already weak testimony of Arthur and Estes.

Like all concerns operating in different states the Western Loan and Building Company had developed an established procedure in handling its sales [R. 201-203 and the requirements relative to investigation, appraisals, etc., called for in the form offer to purchase, Plaintiffs' Exhibit 6, at R. 70]. Estes had been a real estate broker for 15 years [R. 50-51]; in 1943 he was a co-purchaser from Western Loan and Building Company of the Mission Riverside Apartments and six months before that he had acted as the broker in the sale by Western Loan and Building Company of the Melvin Sherwood Apart-

ments [R. 100-101, 76]. As a result of these prior dealings he knew the established practice of the Western Loan and Building Company.

The Western Loan and Building Company was entitled to show that the inventory was not taken until Salt Lake had accepted the offer in those two transactions. The trial court rejected this evidence and the offer of proof.

“Mr. Mulliner: Your Honor has ruled on it, but I offer to prove by Mr. Sullivan, who is here and has been sworn, that on both the Sherwood Melvin deal, handled by Mr. Estes, and the Mission Riverside deal, also handled by him, and in which (151) he was a purchaser, that the deposit, the earnest money deposit such as we have involved in this action, was applied upon the purchase price of those properties. I offer that as bearing upon a practical interpretation of this offer to purchase by at least one of the parties plaintiff here.

Mr. Wilson: Objected to on the ground it is incompetent, irrelevant, and immaterial, and no foundation laid for it.

The Court: Sustained.

Mr. Mulliner: I offer in that connection also to prove that the inventory in each of those instances was taken as it was taken here, as we contend, after notification of the acceptance from Salt Lake.

Mr. Wilson: The same objection.

The Court: Sustained” [R. 208].

The following authorities show that this ruling constituted reversible error:

From Wigmore on Evidence, 3rd Ed., Vol. II, Sec. 377, subd. 2(a), page 309:

“2(a) Contract evidenced by the other contracts with the same person. Here the making of other

contracts with the same person should be received to show either the making in general or the specific terms of the contract in question, provided the other instances were so connected as to indicate a general plan or habit of which they were merely parts; the widespread use of standard printed forms in mercantile and industrial transactions makes this inference a strong one."

From *Rosenberg v. Moore*, 194 Cal. 392 at page 403:

"The defendant contends that the transaction wherein the first refund was made concerned a contract not involved in this action. Plaintiffs reply that the contract there involved was identical in form with those here involved and the statement is not denied by the defendant. We think the conduct of the parties under such former identical contract, and when their relations were harmonious, was competent evidence of the intention of the parties under the subsequent contracts, and there is much force in the suggestion of plaintiffs that the court should give much weight to that practical construction placed upon the subsequent contracts by the parties themselves. The case of *Mitau v. Roddan*, 149 Cal. 1 (6 L. R. A. (N. S.) 275, 84 Pac. 145), fully supports that contention."

From *Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corporation*, 49 F. (2d) 146 at page 151:

"Error is assigned because the trial court admitted orders from the petroleum corporation to the tank company, and invoices therefor, covering other work, about the time of the accident. This was pertinent, persuasive, and material evidence; it proved a uniform course of dealing quite at variance with defendant's claim of no contract."

POINT VII.

There Were Two and Possibly Four Separate Acceptances of the Offer to Purchase by the Western Loan and Building Company.

These four acceptances occurred:

- (a) On April 24, 1944 when Carron verbally notified Arthur by telephone of Salt Lake's acceptance [R. 146-148];
- (b) On May 8, 1944 about 1:30 P. M. when Sullivan verbally notified Arthur by telephone that he (Sullivan) had received the closing papers from Salt Lake [R. 157-158];
- (c) Sometime between April 22, 1944 and April 24, 1944 when Sumner's letter [Defendant's Exhibit I, R. 197] to Sullivan approving the sale was deposited in the mail at Salt Lake (a possible acceptance); and
- (d) Sometime between May 5, 1944 and May 8, 1944 when Salt Lake deposited the executed deed, bill of sale, etc., in the mail [R. 156] (a possible acceptance).

(a) CARRON'S NOTICE OF ACCEPTANCE OF APRIL 24, 1944.

Carron was the only witness who could be considered disinterested. Arthur and Estes were plaintiffs. Sullivan was in the employ of the Western Loan and Building Company. Carron was employed by the Western Loan and Building Company from February 1, 1942, to May 1, 1944. [R. 118.] At the time of trial and some eight months after these events occurred Carron was employed by the Electrical Products Corporation (not the Alcohol Products Corporation as erroneously transcribed in the record). [R. 118.]

Carron's testimony with reference to his telephone notification on April 24, 1944, was concise, clear and to the point [R. 146-148.] It was made after Sumner's letter of April 22, 1944 [Defendant's Exhibit I, R. 197] had been received in Los Angeles, and was heard by Sullivan. [R. 184-189.] It was corroborated by the telephone bill [Defendant's Exhibit F at R. 173]. Carron's call consisted of notifying Arthur that the offer had been accepted and to arrange for the taking of the inventory.

We have already pointed out under Point VI that the inventory followed acceptance. Carron was on the witness stand on two separate occasions. He was never cross-examined. Why?

The only contradiction of this testimony by Carron comes from Arthur, but this is the self-contradictory and illogical testimony that Salt Lake had to have an inventory before it could accept.

Two written instruments from Western Loan and Building Company refer to Carron's verbal acceptance of April 24, 1944. These are the telegram of May 9, 1944, from Salt Lake to Arthur and Estes [Defendant's Exhibit G, R. 179-180] which reads:

"ANSWER YOUR WIRE YOUR OFFER TO PURCHASE WAS ACCEPTED AND YOU WERE SO NOTIFIED PRIOR TO MAY FIRST. UNDER TERMS OF SAID OFFER CANNOT SEE WHY YOU ARE ENTITLED TO REFUND OF DEPOSIT. PLEASE ADVISE WHY YOU THINK YOU ARE SO ENTITLED." (Underscoring ours.) [R. 180.]

and the letter of May 9, 1944, from Sullivan at Los Angeles to Arthur and Estes [Defendant's Exhibit H, R. 181-182]:

"This will confirm the telephone conversation between J. A. Carron and Albert C. Arthur on April

24, 1944, in which Mr. Carron informed Mr. Arthur of the approval by the Western Loan and Building Company Home Office of the sale of the Norman Manor and Norman Manor Annex Apartments under the terms of your Offer to Purchase.

We have deposited with the Security Title Insurance and Guarantee Co., #480 Court Street, San Bernardino, California, the papers and documents necessary to complete the transfer.

You are respectfully reminded that according to the terms of your Offer to Purchase the closing date is May 15, 1944." (Underscoring ours.)

Nowhere in the record do we find that Arthur or Estes ever contradicted or questioned these statements. The reason is obvious. Carron's testimony was true.

(b) SULLIVAN'S ACCEPTANCE OF MAY 8, 1944.

No argument exists as to the fact that Arthur actually received a telephone call from Sullivan that the Western Loan and Building Company had accepted the offer to purchase. [R. 116.] Arthur once fixes the time as May 9, 1944 [R. 116], but there was no telephone call that day; Sullivan places the time as May 8, 1944. [R. 156-157.]

The time is vital to both appellant and appellees.

The record is without conflict that on May 8, 1944, Estes went to attorney Wilson's office to withdraw the offer. [R. 102.] The letters of revocation [Plaintiffs' Exhibit 3, R. 55-56] were drafted, signed and mailed from San Bernardino on May 8, 1944 [R. 103] to Western Loan and Building Company in Los Angeles and at Salt Lake, the letter addressed to Los Angeles being re-

ceived May 9, 1944 [R. 106] and the other being received in Salt Lake three days after mailing. [R. 105.] The telegrams of revocation [Plaintiffs' Exhibit 2, R. 53-54] were likewise sent to Los Angeles and Salt Lake. Both telegrams were night letters and the one to Los Angeles was received by the telegraph office in Los Angeles at 10:13 P. M. (after the close of Western's business hours) and it was not telephoned to the Western Loan and Building Company office until 9:21 A. M. the next morning, May 9, 1944. [R. 106.] The night letter to Salt Lake was received by the telegraph office in Salt Lake on May 9, 1944, at 4:13 A. M. and communicated later that day by the telegraph office to the Western Loan and Building Company. [R. 104-105.]

It is obvious, consequently, that no letter or night letter (telegram) of revocation was received by the Western Loan and Building Company in Los Angeles or Salt Lake until 9:21 A. M. on May 9, 1944. Therefore if Sullivan is correct and this notification from him to Arthur took place on May 8, 1944, then there was a good acceptance and the judgment in favor of Arthur and Estes must be reversed.

Sullivan fixed this time as May 8, 1944, at about 1:30 P. M. [R. 156-157.] It was then that Arthur backed out of the sale [R. 156-157.] Sullivan then telephoned Carron in San Diego [R. 176-177], this was about 2:00 P. M. [R. 177.] Still later that day (May 8, 1944) Sullivan telephoned Estes; this was about 5:30 P. M. [R. 183-184.] Sullivan's testimony as to the time was corroborated twice—first by Carron [R. 205-206], and secondly by an unimpeachable source, the telephone bill which shows all of these calls [Defendant's Exhibit F, R. 170-174 at 173] with no telephone calls on May 9, 1944. [R. 172.]

Estes didn't deny this testimony of Sullivan.

This evidence is overwhelming, and there is no evidence which allows the trial court to place this notification on May 9, 1944.

The finding and conclusion, therefore [27], that plaintiffs revoked their offer on May 8, is not supported by the evidence. The offer was delivered to defendant in person. The plaintiffs chose to revoke it by night letter through the agency of the telegraph company, and by the mail through the agency of the post office. They chose these agencies. This notice was therefore not effective or binding upon defendant until it was received, at least by Mr. Sullivan. If the theory of plaintiffs and the Court were correct, that Mr. Sullivan did not have authority even to communicate notice of the acceptance, then this revocation was not effective until received by the Salt Lake office. In any event, the evidence is conclusive that it was not received until May 9 and was not a valid revocation.

13 C. J., p. 295, citing:

Waterman v. Banks, 144 U. S. 394, 36 L. Ed. 479;

Stitt v. Huidekoper, 21 L. Ed. 644;

Restatement of Contracts, Par. 41 and Par. 69;

13 C. J., p. 302, sec. 120 (directly in point);

Wertheimer v. Wehlc-Hartford, 126 Conn. 30,
9 Atl. (2d) 279, 282.

(c) and (d). There were possibly two other acceptances, one between April 22, 1944, and April 24, 1944, and the other between May 5, 1944 and May 8, 1944. At any rate defendant was working with plaintiffs and going ahead to complete the sale and promptly presented the legally executed documents to close it.

POINT VIII.

The Trial Court Failed and Refused to Make Findings of Fact on the Material Issues.

It is evident that perhaps the two most material issues in this action (brought on the common count) are:

(a) Did Carron advise Arthur on April 24, 1944, in a telephone conversation that Salt Lake had accepted? and

(b) Did Sullivan advise Arthur on May 8, 1944, in a telephone conversation that Salt Lake had accepted and that he had all the closing papers; and if so was this telephone call before or after the receipt of any telegram or letter of revocation?

The Western Loan and Building Company unsuccessfully attempted to have the trial court make clean cut findings on these issues [R. 28 Notice of Motion by Western Loan and Building Company to Vacate Findings Previously Signed and Amend the Findings]. We also proposed findings on these questions. [R. 33-37.] In fact we sought findings on these issues in every possible way.

We had asked for ten days, after service of proposed findings, to make objections and to discuss these. The Court made an order giving us ten days after service. [R. 271.] However, we were, apparently inadvertently, not given this time or opportunity. Upon service and presentation, the findings were signed and filed. We, thereupon, filed a motion asking for vacation or a modification, and specifically requested findings on these two issues. [R. 29.] They were set forth in our motion "A" and "B." [R. 29.]

(Incidentally, we added "C," requesting a finding as to whether the deposit of \$4337.50 was intended to be applied on the purchase price. This appeared to be material.

It had been recited in plaintiffs' Bill of Particulars that it was, "a deposit to apply on the purchase price." [R. 13.] Yet, the Court made a contrary finding. [R. 26.] This is clearly not supported by the record.)

At the close of the evidence, and after telling the Court we were specially interested in findings on (a) and (b), we offered to get out the transcript of the evidence to assist the Court on this. [R. 271.]

The pleadings were general, and these two issues were the material ones developed at the trial. We were trying, as we still are, to have the courts determine whether our method of selling through our sales manager and on this offer is a legal method.

It appeared to be assumed that we had, in view of plaintiffs' admissions, established that Carron did verbally notify plaintiffs of the acceptance, April 24. At the conclusion, the Court asked counsel, in argument, to discuss the matter, "assuming that Mr. Carron's testimony is true, that he 'phoned Mr. Estes or Mr. Arthur on April—whatever date it was." [R. 248.] When the findings were drawn and signed, they simply recited:

"(i) That the defendant did not, prior to receiving notice and obtaining knowledge of plaintiffs' withdrawal and revocation, accept said offer;" [R. 26.]

This is so general as to settle nothing factual so that the law could be applied as to whether the verbal notice by this agent was notice. The Court had indicated it might not be, because it was verbal, and because it did not come from some official, or because this agent might not have authority to communicate it. It will be seen from the Court's statements above quoted, and from the record, that this might also be based upon some theory

of lack of a, preceding, approval by a committee, or the directors, or something of this kind.

What is legal "notice" or what is legal "acceptance" are law questions. His finding, therefore, is in the nature of a legal conclusion.

We could not bring the Court to make a finding on (a) or (b) of the simple underlying facts as to whether the calls were actually made. Such, would have settled these issues and made a simple case out of this.

Now, we cannot tell whether the Court found these facts against us so as to raise the issue of support therefor in the evidence, or, whether he found against us on some theory of law. And, if the latter, upon what theory. The Court discussed at least half a dozen theories [R. 248-271], none of which it is possible to now put our finger on. And they cannot all be briefed here. This situation raises three principles which we invoke:

(1) A trial court cannot, by evasion of a simple, direct, material issue, and by raising numerous possible theories, then, by a general finding, deprive a litigant of any possible review on appeal of the theory relied upon to support such finding.

(2) A trial court cannot avoid a review of its disposition of a material claim by casting it in the form of unreviewable findings of fact.

(3) Under the general claim, as here pleaded, defendant was entitled to findings of fact on these two material issues of fact, joined **at the trial**.

Number (1) above would appear to be quite elementary.

Norris v. Alabama, 294 U. S. 587, 590, support, in principle, number (2).

The following authorities support the foregoing contentions :

Rule 52 says:

“In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon * * * requests for findings are not necessary for purposes of review.”

See *U. S. v. Forness*, 125 F. (2d) 928, 942-43, for a good discussion and notes, including comment, by Justice Hughes on these matters, also:

U. S. v. Jefferson Elec. Co., 291 U. S. 386, 77 L. Ed. 959, 973-75;

Himmell Bros. Co. v. Serrick (7 C. C.), 122 F. (2d) 740. (Also, 119 F. (2d) 704 (3 C. C. and 124 F. (2d) 589.)

In *Hubshman v. Louis Kerr Shoe Co.*, 129 F. (2d) 137, 142, the court said:

“Findings of fact are like a special verdict, and all the facts essential to entitle a party to judgment must be found; and a judgment rendered on a special finding that fails to find all the essential facts is erroneous. *Ward v. Cochran*, 150 U. S. 597, 608, 14 S. Ct. 230, 37 L. Ed. 1195; *United States Fidelity & Guaranty Co. v. Commercial Nat. Bank*, 5 Cir., 55 F. 2d 564, 567; *United States v. Harris*, 7 Cir., 77 F. 821; *Daube v. Philadelphia, etc., Co.*, 7 Cir., 77 F. 713.”

Bridgeport Airport, Inc. v. Title Guaranty & Tr. Co., 111 Conn. 537, 150 Atl. 509, 71 A. L. R. 345, 348.

POINT IX.

Other Reversible Errors.

Some other errors which are relied upon, and to which we now call attention, are:

The trial court rejected all offers of evidence to show a basis of liquidated damages, or our right under the Offer to hold the deposit as such [R. 135-145]. We were sued on the common count for money had and received for plaintiffs' use. The case was tried under the liberalized rules of civil procedure. It was not as if we were suing for damages—we were merely asserting our right to hold the money. The offer of purchase was in evidence. We had established our readiness and willingness to perform the contract. We had gone into escrow. If plaintiffs had been attempting to hold us to the contract, they clearly could have done so. Any legal reason we had for holding the deposit was admissible.

Granite Trust Co. v. Grt. A. & P. T. Co., 36 Fed. Supp. 77, 78.

We were entitled to show all the numerous operations and different people employed in order to complete this sale and the fluctuations, in the interval, in property prices as influenced by the changes in the war situation. It was proper and necessary to do this in order to show a basis for the liquidated damages provision relating to this deposit.

As to this deposit, see:

19 C. J., p. 853;

Howe v. Smith, 27 Law Reports, Ch. D. 89 (a leading case);

Grimsley v. Life Ins. Co. of Va., 154 S. W. (2d) 196 (in point here);

Glock v. Howard & Wilson Co., 123 Cal. 1, 55 Pac. 713 (a leading Cal. case).

Another error, somewhat related to the foregoing, is the finding [R. 26] that it was "untrue" that we were willing and able to perform in accordance with this Offer. This finding is so palpably erroneous, and contrary to all the documentary and other evidence, that discussion is unnecessary.

There was also error, we believe, in the exclusion of the offered testimony of Mr. Sullivan as to what Mr. Carron said to Mr. Arthur when he had him on the telephone on April 24. Whether this constituted notice of the acceptance, was the crux of one main issue. It might have been rejected, without prejudice, as being cumulative, if the Court intended to, and had found, Carron's statement of this conversation to be true. While the Court indicated that it was, we cannot tell that he did so conclude. He did not directly so find. This would appear to constitute an exclusion of material evidence.

It also emphasizes, again, the importance of a finding of fact as to this conversation.

We rely, also, upon the error of the trial court in excluding the testimony of Mr. Estes, one of the plaintiffs and a real estate broker, and, also, the offered testimony of Mr. Sullivan to the effect that Mr. Estes had handled, as broker and purchaser, other similar apartment house transactions with the defendant. That he knew inventories were not taken until after sales were agreed to and that notice of acceptance was communicated in the manner herein involved.

Conclusion.

Since the agreement contained in the Offer to Purchase became effective upon acceptance, and notice thereof given by the agents of defendants and in the manner intended by the parties thereto, and since no withdrawal of the Offer was communicated to defendant before such acceptance, the law appears clear that plaintiffs cannot, upon their own failure and default of performance, recover this deposit.

That any authority to accept cannot be questioned, when all closing documents, authoritatively executed, were delivered in escrow and full performance tendered by defendant, prior to May 15, and within the time agreed to for the closing of the sale.

That after the notice of April 24, plaintiffs joined in taking, and endorsed their approval on the inventory and encouraged and authorized the further proceedings to close the transaction, knowing it would require time beyond May 1, and thus consenting to the further procedure necessary to be taken before May 15. They knew defendant was proceeding with, and did complete, these further steps. They, therefore, waived any technical objections to the sufficiency of notice, if any there were.

If, it is contended, the notices of acceptance of April 24 and May 8 were not given as testified by plaintiffs' witness, defendant is clearly entitled to findings of fact and a clear-cut decision on these underlying material issues. And since the trial court asked for argument

on the assumption that the notice of April 24 was given as testified, and then proposed a number of other theories, and presumptively based decision on one or more of these, it is impossible to determine the factual or legal basis of the findings or judgment. Defendant is thus deprived of its fundamental right of review herein.

For these reasons, and because of the other errors assigned and discussed, it seems to us, that appellant is entitled to a reversal of the judgment herein.

Respectfully submitted,

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